LEE CHEE KIANG

v.

JOHNSON TAN TECK SENG & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K22-129-2007]
14 MARCH 2011

LEGAL PROFESSION: *Duty to client - Conveyancing - Solicitor's failure to check on authenticity of power of attorney - Client unable to proceed with purchase of land despite consideration paid - Whether solicitor to have advised client against release of purchase consideration - Whether duty of solicitor to check on authenticity of power of attorney - Whether solicitor failed in his basic duty to protect client's interest*

LEGAL PROFESSION: *Duty to client - Conflict of interests - Solicitor acting for four parties in transaction - Whether any legal impediment - Standard of care to all parties - Whether same*

TORT: *Negligence - Professional negligence - Standard of care - Rejection of Bolam principle and application of Rogers v. Whitaker principle - Determining factor*

EVIDENCE: *Admissibility - Oral evidence - Evidence Act 1950, s. 91*

CONTRACT: *Power of Attorney - Effect of registration in Sabah - Whether duty of solicitor to check on authenticity*

Sometime in 2006, the plaintiff was approached by the 3rd defendant as to whether he was interested in purchasing a piece of land - NT013022752 ('Native Land') in Sabah. The plaintiff decided to do so with the intention to convert the Native Land at a later stage into a country lease. As the plaintiff did not have the financial ability to implement his intention, he approached one Tee Hong Wee ('PW1'), the director and shareholder of Chang Cheng Realty Sdn Bhd ('CC Realty') and a close friend. The purchase money for the purchase of Native Land came from CC Realty or PW1. The owners of the Native Land were natives and had given a Power of Attorney to one Tuan Haji bin Lambu ('Lambu Power of Attorney') with the power to dispose and charge the same to anyone he deemed fit. Prior to the purchase of the Native Land by the plaintiff, the Native Land was used as a security by the 3rd defendant for a loan from the 4th defendant.

To secure that security, a caveat by one Peter bin Soui was lodged against the Native Land. When the plaintiff approached the 1st defendant solicitor about the purchase of the Native Land, the plaintiff and PW1 were informed by the 1st defendant that to complete the purchase of the Native Land, the sums of RM570,000 and RM200,000 were needed to be paid to the 4th defendant and Tuan Haji Lambu respectively. The 1st defendant and his firm, the 2nd defendant, were retained as solicitors to prepare the sale and purchase agreement and other relevant documents for the purchase of the Native Land. The 1st defendant was also involved in drawing out the relevant legal documents for the loan transaction from the 4th defendant to the 3rd defendant. Eventually, the plaintiff was not able to gain ownership of the Native Land despite having paid the consideration of RM665,300 to the 4th defendant and Tuan Haji Lambu, as the Central Land Officer Kota Kinabalu refused to accept the relevant memorandum of transfer on the ground that there was irregularity in the Lambu Power of Attorney. The plaintiff filed this action claiming for loss and damage suffered in the sum of RM631,300 on the ground that the 1st defendant had breached his duty of care in contract and in tort. The plaintiff withdrew the action against the 4th defendant at the start of the trial, and against the 3rd defendant halfway through trial.

Held (allowing plaintiff's claim):

(1) The evidence to the plaintiff's contention that the Power of Attorney and Trust Deed executed by him to CC Realty was 'to comfort Mr Tee', *ie*, PW1, as he had lent the money to purchase the Native Land was objected to by the 1st defendant on the ground that it contravened s. 91 of the Evidence Act 1950 which provided that no oral evidence was admissible to contradict any terms of agreement when the same had been reduced into writing. That objection was misconceived in that both the Power of Attorney and the Trust Deed were not completed documents and since the defendants were relying on those two documents to advance their case, the court was entitled to know what the real intentions of those documents were. (para 11)

(2) CC Realty was unqualified to purchase the Native Land as it was not a 'native' company. The plaintiff was a native by virtue of his Anak Negeri certificate and the consideration

for the purchase was paid by CC Realty. Even if the plaintiff was used as a nominee to purchase the Native Land, he could sue on behalf of CC Realty. (para 13)

(3) While the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied discretion left to him. At common law the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfill this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. Like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. The normal rule applied by the law is that if anyone holding himself out as possessing reasonable competence in his avocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care. (paras 15 & 16)

(4) The Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor* departed from the *Bolam* principle and adopted the *Rogers v. Whitaker* principle. The Federal Court was dealing with the duty of care of a professional body and whatever principles distilled from that judgment were applicable to other professions. The ultimate question was not whether the defendant's conduct accorded with the practices of his profession or some part of it, but whether it conformed to the standard of care demanded by the law. That was a question for the court and the duty of deciding it could not be delegated to any profession or group in the community. (paras 23-26)

(5) There was no proper system of registration in Sabah pertaining to Power of Attorney as in West Malaysia. Thus, the 1st defendant did not have a duty to check on the authenticity of the power of attorney for the simple reason that there was no way of checking, short of calling the donors and the commissioner of oaths to enquire whether the power of attorney was genuine. It would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it was proper. It would be impractical and slow down the process of doing business in

A the State. Furthermore, commissioners of oath were appointed by the Chief Justice of the Federal Court only after due consideration and hence it could be reasonably assumed that they were people of high standing and integrity. Accordingly, a properly executed power of attorney should B be accepted unless cogent reasons showed otherwise and what those reasons were depended on the circumstances of each case. (para 34)

(6) Registration *per se* of a power of attorney at the Magistrate C Courts and Lands and Surveys Department did not give legitimacy to it. Registration in the Magistrate Court was simply a practice, providing only comfort to the people relying on it. As for registration or notation in the Central Land Office, Kota Kinabalu, it was simply a procedural step D required by the Lands and Surveys Department before processing documents containing signatories executed pursuant to a power of attorney. The Lands and Surveys Department only performed an administrative act when processing documents in its office. The registration and E acceptance of the use of the power of attorney by the Central Land Office, Kota Kinabalu did not give legitimacy to the power of attorney if challenged later. (para 34)

(7) There was no legal impediment for a practitioner in Sabah F to act as a common solicitor to parties in a transaction. The 1st defendant acted for four parties, namely, the plaintiff, 3rd and 4th defendants, and the owners of the Native Land represented by Tuan Haji Lambu by virtue of the power of attorney. The 1st defendant's duty of care to the plaintiff G was no less burdensome to that of the other parties in the transaction. Where the plaintiff was concerned, the 1st defendant had to ensure that his purchase of the Native Land was immune from any loss. The plaintiff however paid a substantial amount of money to the 4th defendant and Tuan Haji Lambu without the benefit of becoming the H registered owner of the Native Land. The plaintiff had, on the evidence presented, established a *prima facie* case of requiring the 1st defendant to protect that basic interest of his and it was incumbent on the 1st defendant to rebut that. (paras 35 & 36)

I

(8) Even if the court accepted that the 1st defendant had explained all legal matters to the plaintiff and CC Realty, there was lacking in details what were the legal liabilities and legal issues. In fact there was no detail before the court. When a defense was short in detail, the court regarded it nothing more than a bare assertion. Accordingly, the court accepted the plaintiff's version that he had been assured by the 1st defendant that there would be 'no problem' with the purchase of the Native Land and there was no explanation of any legal liability and legal issues to the plaintiff. The contention that the plaintiff and PW1 were not ordinary lay person and hence implying that the 1st defendant's duty of care was untenable, the law should be that a solicitor's standard of care remained the same whatever their client's education background was. (paras 38 & 39)

(9) As to which version of events was more credible, the court was guided by what was stated in the judgment in *Tindok Besar Estates Sdn Bhd v. Tinjar Co*. Judicial perception of the evidence required that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. (para 40)

(10) The evidence showed quite conclusively that the 1st defendant failed in his basic duty to protect the interests of the plaintiff. The prevailing conveyance practice in Sabah would be to advise against releasing any purchase consideration to the vendor and chargee until a memorial number was obtained from the Central Land Office, Kota Kinabalu for the lodgement of the memorandum of transfer of the Native Land. The 1st defendant had not given the court any credible reasons as to why he should be exempted from that basic duty. (para 46)

Obiter dictum:

(1) The time has come for the legal profession to regulate the practice of a common solicitor for consumers in land, loan and charge transactions. A good starting point would be for the local Bar to look at the regulatory rules in England. A lawyer cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. It is based on the inescapable conflict of interest which is inherent

in the situation. The case is a classic example as to why the 1st defendant should not have acted for the plaintiff or at the very least should have advised him to engage any other solicitor to act for him. He had to serve four masters, the plaintiff, the 3rd defendant, 4th defendant and the owners of the Native Land who all had different interests in the scheme of things. It was unimaginable as to how the 1st defendant or for that matter any solicitor could have resolved all the conflicting interests of the relevant parties. The 1st defendant had fiduciary duties to all his clients and that duty and standard of care was the same for all his clients. (paras 49 & 50)

Case(s) referred to:
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(not foll)***
Bolkiah v. KPMG [1999] 2 AC 222 ***(refd)***
F v. R [1982] 33 SASR 189 ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2002] 2 CLJ 11 FC ***(foll)***
Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd [1986] 1 LNS 60 PC ***(refd)***
Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***
Midland Bank v. Hett Stubbs & Kemp [1979] Ch 384 ***(refd)***
Rogers v. Whitaker [1992] 175 CLR 479 ***(refd)***
Saif Ali & Anor v. Sydney Mitchell & Co (A Firm) [1980] AC 198 ***(refd)***
Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 91

For the plaintiff - Tiong Jia Yi; M/s Baldev Gan & Assocs
For 1st & 2nd defendant - Joan Goh; M/s Goh & Assocs

Reported by Raphael Kok

JUDGMENT

David Wong Dak Wah J:

Proceedings

[1] The plaintiff's claim is for loss and damage suffered in the sum of RM631,300 on the ground that the 1st defendant had breached his duty of care in contract and in tort, in respect of the purchase of a piece of land - NT013022752 (Native Land).

The claim is denied by the defendants on the ground that the plaintiff had no standing to pursue this suit and even if he had, the 1st defendant did not breach any duty of care, in tort or in contract as he had complied with the practice accepted by the legal profession in Sabah.

[2] The case against the 3rd defendant was withdrawn halfway through the trial while the case against the 4th defendant was withdrawn at the start of the trial as he was never served.

Background Facts

[3] The plaintiff, after being asked by one Wong Nyuk Yun, the 3rd defendant in this case, as to whether he was interested in purchasing the Native Land sometime in 2006, decided to do so with the intention to convert the Native Land at a later stage into a country lease. As the plaintiff did not have the financial ability to implement his intention, he approached one Tee Hong Wee (PW1) who is a director, shareholder of Chang Cheng Realty Sdn Bhd (CC Realty) and a close friend. The plaintiff at that time also worked as a general manager in CC Realty. It is undisputed that the purchase money for the purchase of Native Land came from CC Realty or PW1.

[4] The owners of the Native Land are natives and had given a power of attorney to one Tuan Haji bin Lambu (Lambu power of attorney) with the power to dispose and charge the same to anyone he deems fit. Prior to the purchase of the Native Land by the plaintiff, the Native Land was used as a security by the 3rd defendant for a loan from the 4th defendant. To secure that security, a caveat by one Peter bin Soui was lodged against the Native Land.

[5] When the plaintiff approached the 1st defendant about the purchase of the Native Land, PW1 and the plaintiff were informed by the 1st defendant that to complete the purchase of the native land, a sum of RM570,000 needed to be paid to the 4th defendant plus a sum of RM200,000 to be paid to Tuan Hj Lambu.

[6] It is not disputed that the 1st defendant and the 2nd defendant were retained to prepare the sale and purchase agreement and other relevant documents for the purchase of the Native Land. What is in dispute is whether the 1st defendant had breached his duty of care in the retainer.

[7] It is also not disputed that the 1st defendant was involved in the loan transaction from the 4th defendant to the 3rd defendant, in that he was the solicitor involved in drawing out the relevant legal documents.

[8] What had happened is that the plaintiff was not able to gain ownership of the Native Land despite having paid the consideration of RM665,300 to Tuan Hj Lambu and the 4th defendant, as the Central Land Office, Kota Kinabalu refused to accept the relevant memorandum of transfer on the ground that there was irregularity in the Lambu power of attorney.

Issues

[9] From the evidence and submissions made by counsel the determinative issues, in my view, are these:

(a) Whether the plaintiff had the standing to pursue this action?

(b) Whether the defendants owed a duty of care to the plaintiff in contract or tort?

(c) If the answer to issue no. 2 is in the affirmative, have the defendants breached that duty of care?

(d) If the answer to issue no. 3 is in the affirmative, has the plaintiff proved his damages?

Issue 1

Whether The Plaintiff Has The Standing To Pursue This Action?

[10] It is the defendants' contention that the plaintiff is not the actual purchaser of the Native Land based on the following:

(a) The consideration for the purchase was paid by CC Realty and/or PW1.

(b) The plaintiff was used as a nominee to purchase the Native Land as CC Realty is unqualified to purchase the Native Land as it is not a 'native' company while the plaintiff is a native by virtue of his Anak Negeri certificate.

(c) The legal fees charged by the 2nd defendant and the disbursements incurred were fully paid by CC Realty.

(d) The plaintiff had executed a power of attorney and trust deed to CC Realty.

[11] The plaintiff's contention on this point is the power of attorney and trust deed executed by him was 'to comfort Mr Tee' as he had lent the money to purchase the Native Land. The evidence in respect of this contention was objected to by the 1st defendant's counsel on the ground that it contravenes s. 91 of the Evidence Act 1950 which provides: no oral evidence is admissible to contradict any terms of agreement when the same has been reduced into writing. With respect to counsel, her objection is misconceived in that both the power of attorney and the trust deed were never executed by anyone. In other words, they are not completed documents and since the defendants are relying on those two documents to advance their case, the court is entitled to know what the real intentions of those documents are.

[12] Even if the court sustains the defendants' objection to the evidence, the court is of the view that the power of attorney and trust deed are invalid as they had not been executed by all the relevant parties.

[13] Furthermore the legal bill of the 2nd defendant dated 26 July 2006 for the legal works in respect of the Native Land was issued to the plaintiff. And as pointed by counsel for the plaintiff even if the plaintiff is a nominee, he sues and can sue on behalf of CC Realty.

[14] Accordingly I find that the defendants' contention on this point to be of no merit.

Issue 2

Whether The 1st Defendant Owes A Duty Of Care To The Plaintiff In Contract Or In Tort?

[15] As there is no dispute by the 1st defendant that the plaintiff had retained him for the purchase of the Native Land, the 1st defendant owes the plaintiff a duty of care. What that duty of care is, is set out in these two cases. In *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 the Court held:

> The principle applicable in a case of this nature as rightly applied by the learned Judge is that while the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied

discretion left to him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria. (*Midland Bank Trust and Groom v. Crocker (supra)*).

The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfill this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, Third Edition Volume 36 page 96, paragraph 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do. (*Midland Bank Trust Co Ltd (supra)*).

[16] And in *Saif Ali & Anor v. Sydney Mitchell & Co (A Firm)* [1980] AC 198 at 231 Lord Salmon states as follows:

The normal rule applied by the law is that if anyone holding himself out as possessing reasonable competence in his avocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care. This duty is owed to anyone he should foresee may suffer loss if the duty is breached.

If in breach of that duty, he fails to exercise reasonable competence or care and as a result the person to whom the duty was owed suffers damage he is liable to compensate that person for the damage he has suffered. The law requires the damage to be borne by the person whose breach of duty has caused it, rather than by the innocent person who has suffered it.

Issue 3

[17] If the answer to issue no. 2 is in the affirmative, have the defendants breached that duty of care?

[18] The crux of the plaintiff's claim is embodied in para. 6 of the statement of claim and it is this:

In accepting the said retainer, the 1st and 2nd Defendant held themselves out to the Plaintiff as having the adequate skill, care and knowledge to successfully effect the proposed purchase of the said land or alternatively to alert/or warn the Plaintiff against any potential defect or defect of title of the said land or any defect or want of any of the rights of the purported Attorney to sell the land on behalf of the registered owners of the said land.

[19] The defendants' rebuttal is succinctly set out in para. 5(b) of the defense and it is this: A

> Even if (which is denied) the Defendants were retained by the Plaintiff as his solicitors, the 1st and/or 2nd Defendant only held himself or themselves out to him as having adequate skill and knowledge properly to conduct the sale and purchase of the said Land and/or that his or their duty to him was to exercise that reasonable degree of skill and care expected of a competent practitioner and reasonable experienced solicitor only and not on the terms or the other terms as alleged at paragraph 6 of the Amended Statement of Claim. B C

[20] Before I deal with the factual matrix, I should set out the relevant law on the standard of skill and care expected of legal practitioners in Sabah. In *Midland Bank v. Hett Stubbs & Kemp* [1979] Ch 384, Oliver J emphasized that a solicitor should not be judged by the standard of a "particularly meticulous and conscientious practitioner ... The test is what a reasonably competent practitioner would do having regarded to the standards normally adopted in his profession ..." What that entails requires the court to find out what the standard of the Sabah legal profession is in respect of the works expected of the 1st defendant to perform and if he has acted in accordance to that practice, he would not be negligent. This test is a restatement of what is held in the *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 at p. 121 as follows: D E F

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ... in the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time ... I myself would prefer to put in this way, that he is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way around, a man is not negligent if he is acting in accordance with such practice, merely because there is a body of opinion who would take a contrary view ... a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. G H I

[21] The *Bolam* test has not been followed in the jurisdiction of Australia. King, Chief Justice in *F v. R* [1982] 33 SASR 189 held as follows:

> ... professions may adopt unreasonable practices ... The court has an obligation to scrutinize professional practices to ensure that they accord with the standard of reasonableness imposed by the law ... the ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community'.

[22] This view has been confirmed by the High Court of Australia in *Rogers v. Whitaker* [1992] 175 CLR 479 where it was held that opinions of medical witnesses are not decisive but merely guidelines for the court, who will be the final arbiter on what that standard of care should be.

[23] In the context of Malaysia, we have the celebrated case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2002] 2 CLJ 11 where the Federal Court departed from the *Bolam* principle and adopted the principle stated in the *Rogers* case. The Federal Court said this:

> ... the *Bolam* test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment' (paragraph 36 MLJ)

[24] It is the contention of counsel for the defendants that the *Bolam* test still applies to the legal profession as the question posed to the Federal Court was very specific in that the decision relates purely to medical negligence. For completeness the posed question is this:

> Whether the Bolam test as enunciated in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER in the area of medical negligence should apply in relation to all aspects of medical negligence'.

[25] With respect to counsel, her approach is inappropriate. The Federal Court was dealing with the duty of care of a professional body and whatever principles distilled from that judgment in my view are applicable to other professions. In fact the Federal Court had referred to other professions and this can be seen from this paragraph of the judgment:

> ... there is a need for members of the medical profession to stand up for the wrong doings, if any, **as is the case of professionals in other professions**. In so doing, people involved in medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in deliberations' (para. 69 MLJ) (emphasis added).

[26] Accordingly it is my view that the *Bolam* principle is no longer applicable and the applicable principle is as stated in the Federal Court. With that I will now apply the principle to the factual matrix at hand.

Plaintiff's Complaints

[27] This can be seen from para. 7 of the statement of claim and it is this:

> Particulars of duty of Care:
>
> (i) The 1st and 2nd defendant ought to have taken special caution where the intended transfer of land is to be executed by person or persons purporting to act as the Attorney of the registered landowners *vide* to ensure that the registered owners are in fact the parties who had executed the instrument granting power to sell the land.
>
> (ii) The 1st and 2nd defendant ought to have carefully and properly verified with the registered owners personally to ensure the authenticity of the purported Power of Attorney and to confirm that the landowners had in fact executed the same.
>
> (iii) The 1st and 2nd defendant ought to have advised and acted cautiously and prudently by retaining or withholding a substantial part of the purchase price and only paying out of the same, until and upon the successful transfer of the said land to the Plaintiff.

[28] The plaintiff's evidence is that the 1st defendant is his lawyer and as such it is his duty to ensure that the purchase of the Native Land would be successful and his interests would be

protected at all times. He of course relies on the assurance by the 1st defendant that there would be 'no problem' to the transaction.

Defendants' Case

[29] Counsel in her submission had listed the reasons why the 1st defendant had not breached his duty of care and they can be summarized as follows:

(a) There is no system of checking of power of attorney in Sabah as testified by PW3, hence the defendants should not be expected to conduct any check that is non-existent, in short there is no duty of care on the part of the 1st defendant to check the authenticity of the Lambu power of attorney.

(b) The complaint of the plaintiff is not that he was not advised by the 1st defendant that there were risks involved in the use of power of attorney in the purchase of the Native Land but the fact that the 1st defendant had advised that the deal was legitimate. Counsel refers to this part of PW1's evidence:

> I am blaming the 1st Defendant because since the outset of this deal Mr Lee and I repeatedly asked Johnson Tan if this transaction is legitimate and can be carried through

(c) Whether to proceed with the purchase of Native Land was in fact a business decision by the plaintiff and PW1. This, according to the counsel for the defendants, can be gleaned from the context and circumstances which are summarized by counsel for the defendants in her submission as this:

> Here, the 1st Defendant was involved in the conveyance for the land for the 4th Defendant initially. Halfway through the Plaintiff and CC Realty got involved somewhere in July 2006 through the introduction of the 3rd Defendant because he (the 3rd Defendant) could not proceed with the sales agreement hence he approached the Plaintiff. When the Plaintiff approached the 1st Defendant pertaining to this matter, the 1st Defendant then explained and showed the Plaintiff and PW1 everything that he has in his file pertaining to the said land. After hearing the explanation and after looking at the documents shown to them by the 1st Defendant, CC Realty through PW1 went ahead with the purchase due to the fact that the land was cheap. It was a risk which CC Realty and the Plaintiff took. The 1st Defendant cannot be held to be negligent for a decision that was made by CC Realty and the Plaintiff themselves.

(d) The plaintiff and PW1 are experienced developers and as such are fully aware of what a power of attorney is and further the risk that comes with it. The plaintiff and PW1 knew very well how the normal purchase price is to be paid in sale of land transactions and the payments made by the plaintiff in the manner that it was done was due to the fact that the time of payment between the 3rd defendant and 4th defendant was about to expire and the plaintiff did not want to lose the good deal in that the Native Land was cheap. In short the plaintiff knew the risks and made a business decision to proceed with the purchase of the Native Land.

[30] To complete the defendants' case, I should set out what the 1st defendant said in cross examination:

Q: Refer to paragraph 9 of the witness statement. Put: It was your negligent assumption that the plaintiff, Mr Tee and CC Realty had the necessary knowledge and experience in conveyancing matters in relation to Native Titles and power of attorney?

A: I don't agree because they are developers and it was not wrong for me to assume that they have such knowledge. Most developers have knowledge of land transaction.

Put: That because of your assumption you did not think that it is necessary to advice the plaintiff or Mr Tee on any legal issues and risk.

A: I disagree. Notwithstanding any assumption on the 26/7/2006 I brief Mr Tee and Mr Lee on all the legal liabilities and legal issues involved and they went through the file with me. In fact Mr Lee and Mr Tee asked me whether the power of attorney allows the attorney to sell ...

Q: On 26/7/2006, in relation to the power of attorney what advice did you give to the client?

A: On 26/7/2006 I advice the client that the power of attorney gives the attorney the right to sell the land and the power of attorney is in the process of being registered with the Magistrates Court and upon return of the power of attorney I will note it with the Land Office. At all material time Lee Chee Kiang and Mr Tee have knowledge that the power of attorney were still have to be registered with the Land Office.

A Q: What else did you advice them about the power of attorney?

A: That is it.

PW3 Evidence

B **[31]** PW3, a senior practicing lawyer in the area of conveyancing in Kota Kinabalu, is called by the plaintiff as the expert witness to establish the general practice of the legal profession in Sabah. In essence his evidence is this:

C Q: Please tell the Court what is your practice when a client approaches you to engage your services in respect of the sale and purchase of land to be executed by the Vendor through a Power of Attorney?

D A: Normally by practice I do not accept Power of Attorney for the reason that there is no proper of registration of power of attorney in Sabah as compared to West Malaysia. There is no way I can check whether the PA has been revoked. In West Malaysia we can check the system under the PA Act 1949 which is only applicable to West Malaysia. In respect of the PA once registered it has to be deposited with E the Senior Assistant Registrar in the Court in which it was deposited. Any subsequent revocation of the PA would have to be deposited in the same Court. In Sabah there is no such system in place. Speaking for myself my practice I do not accept PA. Secondly, there could be many PA over the F same subject matter. There is no registration system in Sabah to check whether the PA has been issued before or has been donated before.

"The general practice is for the PA to be noted in the Land Registry for properties with titles. If there is a noting and a G registration number and there is a term of clause in the PA which provides for that particular power to be effected then generally speaking the practice is for the lawyer in the conveyancing procedure to accept such PA."

By notation in the land registry there are safeguards that the H PA has been registered and notice has been given to third parties. However having said that it is my practice to be overly cautious even when the PA has been registered in the land and survey department. The reason is that the land survey department are merely performing an administrative I act when they register the PA. They are not under the legal duty to enquire into the validity of the PA. I highlight this matter in one of my law book under a decision by Datuk Clement Allan Skinner in the case of Pawa Ajah. The

lawyers can protect themselves by extracting the PA which has been registered in the Land Office by extracting the copy of the PA and studying its contents carefully.

[32] One can see that PW3's view is that the use of power of attorney in land transactions is not advisable. In cross-examination, his testimony contains a similar theme and this can be seen from this interchange:

Q: Do you agree with me that since there is actually no system of PA in Sabah as compared to West Malaysia, there is no standard practice except for notation at the Land Office and registration at the Magistrates Court?

A: I would just say that for practitioners who do not want to get into trouble get the registered owner to sign instead of the Attorney.

Q: Is that your general practice?

A: I cannot say for others but from my conversation with fellow practitioners, generally this is the accepted practice in Sabah to get the registered owner to sign instead of the Attorney.

[33] With respect to PW3, his non-acceptance of the use of power of attorney in land transactions is not only impractical but would affect the flow of business activity in the State economy. It, in effect, renders contractual law relating to power of attorney redundant. Be that as it may, the Lands and Surveys Department in Sabah, I am given to understand, now does not accept documents executed pursuant to power of attorney. This shows the severity of the abuse of the use of power of attorney in land transactions in the State and I may add that is a sorry state of affairs that we are in. It is also my view that PW3's evidence has not established what the general practice of the local legal profession as far as the use of power of attorney is concerned as his evidence contains his personal view and practice.

Findings Of The Court

Duty To Investigate The Authenticity Of Power Of Attorney

[34] The situation in Sabah as far as power of attorney is concerned is as what is stated by PW3 and that is there is no proper system of registration as in West Malaysia. Hence I agree with counsel for the defendants that the 1st defendant does not have a duty to check on the authenticity of the power of

attorney for the simple reason that there is no way of checking short of calling the donors and the commissioner of oaths to enquire whether the power of attorney is genuine. It would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it is proper. As stated earlier it would be impractical and slows down the process of doing business in the State. Furthermore, commissioners of oath are appointed by the Chief Justice of the Federal Court only after due consideration and hence it can be reasonably assumed that they are people of high standing and integrity. Accordingly it is my view that a properly executed power of attorney should be accepted unless cogent reasons show otherwise and what those reasons are depends on the circumstances of each case. Before I leave this area of discussion, I should comment on the legal effect of registration of power of attorney and it is this. Registration *per se* of a power of attorney at the magistrate courts and Lands and Surveys Department do not give legitimacy to it. Registration in the magistrate court is nothing but a practice and provides nothing but comfort to the people relying on it. As for registration or notation in the Central Land Office, Kota Kinabalu, it is nothing but a procedural step which the Lands and Surveys Department requires before they can process documents containing signatories executed pursuant to a power of attorney. As rightly pointed out by PW3, the Lands and Surveys Department is only performing an administrative act when processing documents in their office and the registration and acceptance of the use of the power of attorney by the Central Land Office, Kota Kinabalu does not give legitimacy to the power of attorney if challenged later.

1st Defendant's Duty And Standard Of Care

[35] As there is no dispute (and in fact conceded by counsel for the defendants) that there is a retainer in respect of the purchase of the Native Land between the plaintiff and 2nd defendant, the 1st defendant thus has a duty of care to the plaintiff. What is in dispute is what that duty is and the standard thereof? Before I discuss that, the following should be noted. The 1st defendant prior to being retained by the plaintiff had acted for the 3rd and 4th defendant where the 4th defendant extended a loan to the 3rd defendant on the security of the Native Land. To crystallize that security, the 3rd defendant relied on the Lambu power of attorney and the original title deed to the Native Land. In order for the plaintiff to crystallize his purchase of the Native Land, the

plaintiff was advised by the 1st defendant that he had to pay off both the 4th defendant and Tuan Hj Lambu as representative of the land owners. And hence the use of the Lambu power of attorney is pivotal to the plaintiff in his purchase of the Native Land. There is no legal impediment for a practitioner in Sabah to act as a common solicitor to parties in a transaction and hence in this purchase of the Native Land, the 1st defendant had acted for four parties, namely, the plaintiff, 3rd and 4th defendant and the owners of the Native Land represented by Tuan Hj Lambu by virtue of the power of attorney. Be that as it may, the 1st defendant's duty of care to the plaintiff is no less burdensome to that of the other parties in the transaction. In other words, the interests of all the parties must be protected even though they may conflict with each other. How that is possible remains a mystery to the court. As far as the plaintiff is concerned and in normal circumstances, his basic interest, in plain language, is simply for the 1st defendant to ensure that his purchase of the Native Land is immune from any loss as has happened in this case where the plaintiff has paid a substantial amount of money to the 4th defendant and Tuan Hj Lambu without the benefit of becoming the registered owner of the Native Land. Of course the defense is that the circumstances in this case is not normal and this case must be determined in accordance with the peculiar facts herein.

[36] However it is my view that the plaintiff has, on the evidence presented, established a *prima facie* case of requiring the 1st defendant to protect this basic interest and it is incumbent on the 1st defendant to rebut that.

[37] Having carefully considered the evidence of the 1st defendant, there appears to be two lines of defences which are these:

(a) The plaintiff and CC Realty are experienced developers and knew the full intricacy of how a power of attorney works and the risks involved. That being the case, plus the fact that they did not want to lose a 'good deal', they took the risks involved in the use of a power of attorney in proceeding with the purchase and did not need the advice of the 1st defendant.

(b) The 1st defendant had explained 'all the legal liabilities and legal issues' involved.

[38] The two defences in my view contradict each other because one says that the plaintiff and CC Realty did not need the 1st defendant's advice, while the other says the 1st defendant had explained all the legal matters to the plaintiff. With such a contradictory stance, the 1st defendant's defence appears to be shadowy. Even if the court accepts that the 1st defendant had explained all legal matters to the plaintiff and CC Realty, there is lacking in details what are the legal liabilities and legal issues. In fact there is no detail before the court. Again it is trite law when a defence is short in detail; the court regards it nothing more than a bare assertion. Furthermore it is unlikely that the 1st defendant had explained 'all the legal liabilities and legal issues' to the plaintiff except to assure all will be okay and the reasons are these. The 1st defendant had acted for the 3rd and 4th defendant in respect of a loan using the power of attorney to Tuan Hj Lambu and Native Land as security and one can assume that he had informed the 3rd and 4th defendant that the use of the Lambu power of attorney for the loan transaction was proper. Hence upon being approached by the plaintiff for the purchase the Native Land, the 1st defendant would have no doubt told the plaintiff that there should be 'no problem' as he had already given a similar advice to the 3rd and 4th defendant. But as to how the 1st defendant arrived at that 'advice' to the 3rd and 4th defendant the court is not aware. Accordingly I accept the version of the plaintiff that he had been assured by the 1st defendant that there will 'no problem' with the purchase of Native Land and there was no explanation of any legal liability and legal issues to the plaintiff.

[39] As for the contention that the plaintiff and PW1 are not ordinary lay persons and hence implying that the 1st defendant's duty of care is lighter, I, with respect, find it untenable. The law should be (and I am sure it is) that a solicitor's standard of care remains the same whatever their client's education background is. This proposition requires no supporting authority. In any event the 1st defendant is an experienced and senior member of the local Bar and prudence would have dictated him to obtain a letter of declaimer from the plaintiff stating that the 2nd defendant would not be liable for any loss or damage if he wants to release any part of the consideration before the lodgement of the memorandum of transfer with the Lands and Surveys Department Central Land Office, Kota Kinabalu and the issuance of the memorial number of the lodgment by the same. I have no doubt that the prevailing

conveyance practice in Sabah in a sale and purchase cum redemption of loan transaction is this. No money from the purchaser would be released by the solicitor until he or she obtains a memorial number from the Central Land Office Kota Kinabalu for the lodgement of the transfer with the title to the Native Land.

[40] In my deliberation as to which version of events is more credible I was guided by what was stated in the judgment in *Tindok Besar Estates Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 which stated:

> For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.

[41] Also in *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1986] 1 LNS 60, the court expressed similar sentiments:

> And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall possibilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *The Ocean Frost; Armagas Ltd v. Mundogas SA* [1985] 1 Lloyd's Rep 1 when he said at p. 57:
>
> > Speaking from experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

A That observation is, in their Lordship's opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

B **[42]** The question which confronts me now is this:

What did the 1st defendant mean by 'no problem'?

[43] There is no doubt in my mind that by 'no problem', the 1st C defendant and the plaintiff took it to mean that the purchase of the Native Land would present no legal difficulty to implement and again my reason is that the 1st defendant had acted as the solicitor for the 4th defendant and 3rd defendant in the loan transaction prior to the purchase of the Native Land by the D plaintiff. Of course the purchase of the Native Land was not able to be implemented as the legitimacy of the power of attorney was in doubt.

[44] The following matters are undisputed:

E (a) The caveat of Peter bin Soui who is a nominee of the 4th defendant was only presented to the Lands and Surveys Department on 2 June 2006 with no issuance of memorial number from Central Land Office, Kota Kinabalu.

F (b) The memorandum of transfer supporting the caveat by Peter bin Soui does not contain any 'CLO P/A No' for Lambu power of attorney.

(c) The Lambu power of attorney was only presented to the Central Land Office, Kota Kinabalu for registration on G 7 August 2006.

(d) The memorandum of transfer of the Native Land was lodged with Central Land Office, Kota Kinabalu on 25 August 2006.

H (e) The Central Land Office on 4 September 2006 informed the 2nd defendant that the Lambu power of attorney could not be registered as one of the landowners had lodged a complaint to their office.

I (f) The 1st defendant did not investigate the September 2006 reply by the Central Land Office, Kota Kinabalu and this is what he says in cross-examination:

Q: Did you attend at the Land Office to see anyone regarding this letter? A

A: I did not. What I did is I liaise with Mr Wong and ask him to solve this matter with the Land Office.

(g) The 2nd defendant again on 17 October 2006 lodged the memorandum of transfer of the Native Land with Central Land Office, Kota Kinabalu. B

(h) On 3 October 2007, the 2nd defendant wrote to the Central Land Office, Kota Kinabalu enquiring the status of the transfer of Native Land. C

(i) The Central Land Office, Kota Kinabalu on 22nd August 2008 informed the 2nd defendant that the memorandum of transfer could not be processed because of two police reports, one by one of the owners of the Native Land and the other by the plaintiff. The Lands and Surveys Department had also registered a collector's caveat on the Native Land. D

[45] To recap, what we have at hand is the sale and purchase transaction of native landed property encumbered with an equitable charge for a loan extended to the 3rd defendant by the 4th defendant. The duties of a solicitor would be these: E

(a) Conduct a search on the Native Land at the relevant office of the Lands and Surveys Department to ensure that there is no encumbrance attached to it. F

(b) Obtain the original title deed to the Native Land.

(c) Ensure that the Lambu power of attorney has been properly executed and witnessed by the appropriate person and contains the power of disposal of the Native Land. G

(d) Ensure that the Lambu power of attorney has been registered with the magistrate court and with the Central Land Office Kota Kinabalu. H

(e) Advise the plaintiff that it is not in his interest to release any money to the owners or the 4th defendant who holds an equitable charge on the Native Land until all the relevant documents have been executed and the memorandum of transfer together with the supporting documents had been successfully lodged to Central Land Office Kota Kinabalu and the issuance of the memorial number by the same. I

(f) Explain to the plaintiff all the risks involved in the use of a power of attorney in the purchase of the Native Land, the primary risk being that the owners may not have signed the power of attorney.

(g) Inform the plaintiff that he acts as a common solicitor for four parties in the transaction and the risks related thereto.

(h) Advice the plaintiff to engage another solicitor to act for him for the purchase of the Native Land to avoid any conflict of interests between the four parties.

[46] From the evidence which I have alluded to earlier, it shows quite conclusively that the 1st defendant had, with respect, failed in his basic duty in protecting the interests of the plaintiff. As stated by earlier, the prevailing conveyance practice in Sabah would be to advice against releasing any purchase consideration to the vendor and chargee until a memorial number is obtained from the Central Land Office, Kota Kinabalu by the solicitor for the lodgement of the memorandum of transfer of the Native Land. The 1st defendant has not given the court any credible reasons as to why he should be exempted from that basic duty.

[47] As for the sum claimed, the sum of RM631,300 in my view has been proved by the plaintiff in the form of documentary evidence and they have not been rebutted by the defendants.

[48] Accordingly I dismiss the defendants' defence and enter judgment for the plaintiff in the sum of RM631,300 with interests at the rate of 8% per annum from the date of this judgment until final payment of the judgment sum with costs.

[49] As a closing remark, let me say that the time has come for the legal profession to regulate the practice of a common solicitor for consumers in land, loan and charge transactions. A good starting point would be for the local Bar to look at the regulatory rules in England which I have attached as Annexure A (at p. 522 - editor). Lord Millet in *Bolkiah v. KPMG* [1999] 2 AC 222 in my view had made a pertinent remark and it is this:

> A [lawyer] cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[50] The case before me is a classic example as to why the 1st defendant should not have acted for the plaintiff or at the very least should have advised him to engage any other solicitor to act for him. He had to serve four masters, the plaintiff, the 3rd defendant, 4th defendant and the owners of the Native Land who all had different interests in the scheme of things. It is unimaginable as to how the 1st defendant or for that matter any solicitor could have resolved all the conflicting interests of the relevant parties. It must be noted that the 1st defendant has fiduciary duties to all his clients and that duty and standard of care is the same for all his clients.

Order accordingly.

ANNEXURE A*

Rule

3.01 Duty not to act

(1) You must not act if there is a conflict of interests (except in the limited circumstances dealt with in 3.02).

(2) There is a conflict of interests if:

(a) you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict; or (b) your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.

(3) For the purpose of 3.01(2), a related matter will always include any other matter which involves the same asset or liability.

3.02 Exceptions to duty not to act

(1) You or your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the different clients have a substantially common interest in relation to that matter or a particular aspect of it; and

(b) all the clients have given in writing their informed consent to you or your firm acting.

* see para 49 of judgment at p. 521

(2) Your firm may act for two or more clients in relation to a matter in situations of conflict or possible conflict if:

(a) the clients are competing for the same asset which, if attained by one client, will make that asset unattainable to the other client(s);

(b) there is no other conflict, or significant risk of conflict, between the interests of any of the clients in relation to that matter;

(c) the clients have confirmed in writing that they want your firm to act in the knowledge that your firm acts, or may act, for one or more other clients who are competing for the same asset; and

(d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of, more than one of those clients.

(3) When acting in accordance with 3.02(1) or (2) it must be reasonable in all the circumstances for you or your firm to act for all those clients.

(4) If you are relying on the exceptions in 3.02(1) or (2), you must:

(a) draw all the relevant issues to the attention of the clients before agreeing to act or, where already acting, when the conflict arises or as soon as is reasonably practicable, and in such a way that the clients concerned can understand the issues and the risks involved;

(b) have a reasonable belief that the clients understand the relevant issues; and

(c) be reasonably satisfied that those clients are of full capacity.

3.03 Conflict when already acting

If you act, or your firm acts, for more than one client in a matter and, during the course of the conduct of that matter, a conflict arises between the interests of two or more of those clients, you, or your firm, may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to the other client(s) is not put at risk.

3.04 Accepting gifts from clients

Where a client proposes to make a lifetime gift or a gift on death to, or for the benefit of:

(a) you;

(b) any manager, owner or employee of your firm;

(c) a family member of any of the above,

and the gift is of a significant amount, either in itself or having regard to the size of the client's estate and the reasonable expectations of the prospective beneficiaries, you must advise the client to take independent advice about the gift, unless the client is a member of the beneficiary's family. If the client refuses, you must stop acting for the client in relation to the gift.

3.05 Public office or appointment leading to conflict

You must decline to act where you, a member of your family, or a manager, owner or employee of your firm holds some public office or appointment as a result of which:

(a) a conflict of interests, or a significant risk of a conflict, arises;

(b) the public might reasonably conclude that you, or your firm, had been able to make use of the office or appointment for the advantage of the client; or

(c) your ability to advise the client properly and impartially is inhibited.

3.06 Alternative dispute resolution (ADR)

If you provide ADR services you must not:

(a) advise or act for any party in respect of a dispute in which you or any person within your firm is acting, or has acted, as mediator;

(b) provide ADR services in connection with a matter in which you or any person within your firm has acted for any party; or

(c) provide ADR services where you or any person within your firm has acted for any of the parties in issues not relating to the mediation, unless that has been disclosed to the parties and they consent to your acting.

3.07 Acting for seller and buyer in conveyancing, property selling and mortgage related services

(1) Rules 3.07 to 3.15 apply to the transfer of land for value, and the grant or assignment of a lease or some other interest in land for value. Both commercial and residential conveyancing transactions are covered. The terms "seller" and "buyer" include a lessor and lessee. "You" is defined in 23.01, but is to be construed in 3.07 to 3.15 as including an associated firm (see rule 24 (Interpretation) for the meaning of "associated firms").

(2) You must not act for more than one party in conveyancing, property selling or mortgage related services other than as permitted by, and in accordance with, 3.08 to 3.15. "Property selling" means negotiating the sale for the seller. "Mortgage related services" means advising on or arranging a mortgage, or providing mortgage related financial services, for a buyer. "Mortgage" includes a remortgage.

3.08 Conveyancing transactions not at arm's length

Subject to the prohibition in 10.06(3) and 10.06(4), you may act for seller and buyer when the transaction between the parties is not at arm's length, provided there is no conflict or significant risk of conflict.

3.09 Conveyancing transactions at arm's length

Subject to the prohibition in 10.06(3) and (4), you may act for seller and buyer if the conditions set out in 3.10 below are satisfied and one of the following applies:

(a) both parties are established clients;

(b) the consideration is £10,000 or less and the transaction is not the grant of a lease; or

(c) seller and buyer are represented by two separate offices in different localities.

3.10 Conditions for acting under 3.09

In order to act for seller and buyer under 3.09 above, the following conditions must be met:

(a) the written consent of both parties must be obtained;

(b) no conflict of interests must exist or arise;

(c) the seller must not be selling or leasing as a builder or developer; and

(d) when the seller and buyer are represented by two separate offices in different localities:

(i) different individuals authorised to do the work, who normally work at each office, conduct or supervise the transaction for seller and buyer; and

(ii) no office of the firm (or an associated firm) referred either client to the office conducting the transactions.

3.11 Property selling and mortgage related services

Subject to the prohibition in 10.06(3) and (4), you may act for seller and buyer if the conditions set out in 3.13 below are satisfied and one of the following applies:

(a) the only way in which you are acting for the buyer is in providing mortgage related services; or

(b) the only way in which you are acting for the seller is in providing property selling services through a Solicitors' Estate Agency Limited (SEAL).

3.12 SEALs and participating firms

A SEAL means a recognised body which:

(a) is a company;

(b) does not undertake conveyancing;

(c) is owned jointly by at least four participating firms which are not associated firms;

(d) has no participating firm with majority control;

(e) has at least one participating firm which is a recognised body or recognised sole practitioner; and

(f) is conducted from accommodation physically divided from, and clearly differentiated from that of any participating firm.

A "participating firm" means a recognised sole practitioner, recognised body or authorised non-SRA firm which is a manager or owner of the SEAL, or one or more of whose managers or owners is a manager or owner of the SEAL.

3.13 Conditions for acting under 3.11

In order to act for seller and buyer under 3.11 above, the following conditions must be met:

(a) the written consent of both parties must be obtained;

(b) no conflict of interests must exist or arise;

(c) the seller must not be selling or leasing as a builder or developer;

(d) different individuals must conduct the work for the seller and the work for the buyer and, if these individuals need supervision, they must be supervised by different individuals who are authorised to do the work;

(e) you must inform the seller in writing, before accepting instructions to deal with the property selling, of any services which might be offered to a buyer, whether through the same firm or any associated firm; and

(f) you must explain to the buyer, before the buyer gives consent to the arrangement:

(i) the implications of a conflict of interests arising;

(ii) your financial interest in the sale going through; and

(iii) if you propose to provide mortgage related services to the buyer through a SEAL which is also acting for the seller, that you cannot advise the buyer on the merits of the purchase.

3.14 Special circumstances in property selling and conveyancing

If any of the circumstances set out in 3.09 apply (established clients; consideration of £10,000 or less; representation by two separate offices), you may sell the property, provide mortgage related services, and act for seller and buyer in the conveyancing, subject to the prohibition in 10.06(3) and (4) and compliance with the conditions set out in 3.10 and 3.13 as appropriate.

3.15 Conflict arising when acting for seller and buyer

If a conflict arises during the course of a transaction in which you are acting for more than one party, you may continue to act for one of the parties only if the duty of confidentiality to the other party is not at risk.

3.16 Acting for lender and borrower in conveyancing transactions

(1) Rules 3.16 to 3.22 cover the grant of a mortgage of land and are intended to avoid conflicts of interests. "Mortgage" includes a remortgage. Both commercial and residential conveyancing transactions are covered. "You" is defined in 23.01, but is to be construed in 3.16 to 3.22 as including an associated firm (see rule 24 (Interpretation) for the meaning of "associated firms").

(2) You must not act for both lender and borrower on the grant of a mortgage of land:

(a) if a conflict of interests exists or arises;

(b) on the grant of an individual mortgage of land at arm's length;

(c) if, in the case of a standard mortgage of property to be used as the borrower's private residence only, the lender's mortgage instructions extend beyond the limitations contained in 3.19 and 3.21, or do not permit the use of the certificate of title required by 3.20; or

(d) if, in the case of any other standard mortgage, the lender's mortgage instructions extend beyond the limitations contained in 3.19 and 3.21.

3.17 Standard and individual mortgages

(1) A mortgage is a "standard mortgage" where:

(a) it is provided in the normal course of the lender's activities;

(b) a significant part of the lender's activities consists of lending; and

(c) the mortgage is on standard terms.

An "individual mortgage" is any other mortgage.

(2) A mortgage will not be on standard terms if material terms in any of the documents relating to the mortgage transaction are negotiated between the lender's and borrower's lawyers contemporaneously with effecting the mortgage. In commercial transactions, the element of negotiation will often relate to the facility letter or facility agreement rather than the mortgage deed itself.

(3) Provided there has been no contemporaneous negotiation of material terms between the parties' lawyers, a mortgage will be on standard terms where the lender uses a prescribed form of mortgage deed. Minor variations, such as the usual clause limiting the liability of trustee mortgagors, are not regarded as material and do not alter the nature of these terms as standard.

(4) In addition to its normal standard terms, a lender may have a different set or sets of standard terms applicable to specialised types of borrower, such as registered social landlords. Provided these terms are applied by the lender to all equivalent specialist borrowers or have been agreed between the lender and a specialist borrower as applicable to all transactions between them, they will constitute standard terms for the purposes of 3.16 to 3.22.

(5) The lender and the borrower must be separately represented on the grant of an individual mortgage at arm's length (see 3.16(2)(b)). Rules 3.16 to 3.22 are not then applicable.

(6) You may act for both lender and borrower in a standard mortgage (see 3.16(2)(c) to (d)), provided:

(a) there is no conflict of interests;

(b) the mortgage instructions do not go beyond the limits set out in 3.19; and

(c) in the case of a property to be used solely as the borrower's private residence, the approved certificate of title set out in the annex to rule 3 is used.

(7) The limitations of 3.19 also apply to a standard mortgage where the lender and the borrower are separately represented (see 3.22(1) which includes certificates of title). However, 3.22(2) allows the borrower's lawyer, in a transaction where the property is not to be used solely as the borrower's private residence, to give a certificate of title in any form recognised by the Solicitors Regulation Authority Board. You also remain free to give any other form of certificate which complies with this rule.

(8) There may be cases where the lapse of time between the mortgage offer and completion (for example, when new properties are added) results in use of an earlier edition of a recognised certificate. That is acceptable.

3.18 Notification of certain circumstances to lender

(1) If you wish to act for both lender and borrower on the grant of a standard mortgage of land, you must first inform the lender in writing of the circumstances if:

(a) the prospective borrower is:

(i) the firm or any of its managers or owners, or a member of their immediate family;

(ii) an associated firm, any of its managers or owners, or a member of their immediate family; and/or

(iii) the individual conducting or supervising the transaction, or a member of their immediate family; or

(b) you propose to act for seller, buyer and lender in the same transaction.

(2) "Immediate family" means spouse, children, parents, brothers and sisters.

3.19 Types of instruction which may be accepted

If acting for both lender and borrower in a standard mortgage, you and the individual conducting or supervising the transaction may only accept or act upon instructions from the lender which are limited to the following matters:

(a)

(i) taking reasonable steps to check the identity of the borrower (and anyone else required to sign the mortgage deed or other document connected with the mortgage) by reference to a document or documents, such as a passport, precisely specified in writing by the lender;

(ii) following the guidance given by the Law Society or the Solicitors Regulation Authority on property fraud and on money laundering;

(iii) checking that the seller's conveyancers (if unknown to you) appear in a current legal directory or hold practising certificates issued by their professional body; and

(iv) in the case of a lender with no branch office within reasonable proximity of the borrower, carrying out the money laundering checks precisely specified in writing by the lender;

(b) making appropriate searches relating to the property in public registers (for example, local searches, commons registration searches, mining searches), and reporting any results specified by the lender or which you consider may adversely affect the lender; or effecting search insurance;

(c) making enquiries on legal matters relating to the property reasonably specified by the lender, and reporting the replies;

(d) reporting the purchase price stated in the transfer and on how the borrower says that the purchase money (other than the mortgage advance) is to be provided; and reporting if you will not have control over the payment of all the purchase money (other than a deposit paid to an estate agent or a reservation fee paid to a builder or developer);

(e) reporting if the seller or the borrower (if the property is already owned by the borrower) has not owned or been the registered owner of the property for at least six months;

(f) if the lender does not arrange insurance, confirming receipt of satisfactory evidence that the buildings insurance is in place for at least the sum required by the lender and covers the risks specified by the lender; giving notice to the insurer of the lender's interest and requesting confirmation that the insurer will notify the lender if the policy is not renewed or is cancelled; and supplying particulars of the insurance and the last premium receipt to the lender;

(g) investigating title to the property and appurtenant rights; reporting any defects revealed, advising on the need for any consequential statutory declarations or indemnity insurance, and approving and effecting indemnity cover if required by the lender; and reporting if you are aware of any rights needed for the use or enjoyment of the property over other land;

(h) reporting on any financial charges (for example, improvement or repair grants or Housing Act discounts) secured on the property revealed by your searches and enquiries which will affect the property after completion of the mortgage;

(i) in the case of a leasehold property:

(i) confirming that the lease contains the terms stipulated by the lender and does not include any terms specified by the lender as unacceptable;

(ii) obtaining a suitable deed of variation or indemnity insurance if the terms of the lease are unsatisfactory;

(iii) enquiring of the seller or the borrower (if the property is already owned by the borrower) as to any known breaches of covenant by the landlord or any superior landlord and reporting any such breaches to the lender;

(iv) reporting if you become aware of the landlord's absence or insolvency;

(v) making a company search and checking the last three years' published accounts of any management company with responsibilities under the lease;

(vi) if the borrower is required to be a shareholder in the management company, obtaining the share certificate, a blank stock transfer form signed by the borrower and a copy of the memorandum and articles of association;

(vii) obtaining any necessary consent to or prior approval of the assignment and mortgage;

(viii) obtaining a clear receipt for the last payment of rent and service charge; and

(ix) serving notice of the assignment and mortgage on the landlord;

(j) in the case of a commonhold unit:

(i) confirming receipt of satisfactory evidence that common parts insurance is in place for at least the sum required by the lender and covers the risks specified by the lender;

(ii) confirming that the commonhold community statement contains the terms specified by the lender and does not include any restrictions on occupation or use specified by the lender as unacceptable;

(iii) enquiring of the seller (or the borrower if the property is already owned by the borrower) and the commonhold association as to any known breaches of the commonhold community statement by the commonhold association or any unitholder, and reporting any such breaches to the lender;

(iv) making a company search to verify that the commonhold association is in existence and remains registered, and that there is no registered indication that it is to be wound up;

(v) obtaining the last three years' published accounts of the commonhold association and reporting any apparent problems with the association to the lender;

(vi) obtaining a commonhold unit information certificate; and

(vii) serving notice of the transfer and mortgage of the commonhold unit on the commonhold association;

(k) if the property is subject to a letting, checking that the type of letting and its terms comply with the lender's requirements;

(l) making appropriate pre-completion searches, including a bankruptcy search against the borrower, any other person in whom the legal estate is vested and any guarantor;

(m) receiving, releasing and transmitting the mortgage advance, including asking for any final inspection needed and dealing with any retentions and cashbacks;

(n) procuring execution of the mortgage deed and form of guarantee as appropriate by the persons whose identities have been checked in accordance with any requirements of the lender under (a) above as those of the borrower, any other person in whom the legal estate is vested and any guarantor; obtaining their signatures to the forms of undertaking required by the lender in relation to the use, occupation or physical state of the property; and complying with the lender's requirements if any document is to be executed under a power of attorney;

(o) asking the borrower for confirmation that the information about occupants given in the mortgage instructions or offer is correct; obtaining consents in the form required by the lender from existing or prospective occupiers of the property aged 17 or over specified by the lender, or of whom you are aware;

(p) advising the borrower on the terms of any document required by the lender to be signed by the borrower;

(q) advising any other person required to sign any document on the terms of that document or, if there is a conflict of interests between that person and the borrower or the lender, advising that person on the need for separate legal advice and arranging for them to see an independent conveyancer;

(r) obtaining the legal transfer of the property to the mortgagor;

(s) procuring the redemption of:

(i) existing mortgages on property the subject of any associated sale of which you are aware; and

(ii) any other mortgages secured against a property located in England or Wales made by an identified lender where an identified account number or numbers or a property address has been given by the lender;

(t) ensuring the redemption or postponement of existing mortgages on the property, and registering the mortgage with the priority required by the lender;

(u) making administrative arrangements in relation to any collateral security, such as an endowment policy, or in relation to any collateral warranty or guarantee relating to the physical condition of the property, such as NHBC documentation;

(v) registering the transfer and mortgage;

(w) giving legal advice on any matters reported on under 3.19, suggesting courses of action open to the lender, and complying with the lender's instructions on the action to be taken;

(x) disclosing any relationship specified by the lender between you and the borrower;

(y) storing safely the title deeds and documents pending registration and delivery to or as directed by the lender; and

(z) retaining the information contained in your conveyancing file for at least six years from the date of the mortgage.

3.20 Using the approved certificate of title

In addition, if acting for both lender and borrower in a standard mortgage of property to be used as the borrower's private residence only:

(a) you must use the certificate of title set out in the annex to rule 3 (below) ("the approved certificate"); and

(b) unless the lender has certified that its mortgage instructions are subject to the limitations contained in 3.19 above and 3.21 below, you must notify the lender on receipt of instructions that the approved certificate will be used, and that your duties to the lender are limited to the matters contained in the approved certificate.

A 3.21 Terms of rule to prevail

The terms of 3.16 to 3.20 above will prevail in the event of any ambiguity in the lender's instructions, or discrepancy between the instructions and 3.19 above or the approved certificate.

B 3.22 Anti-avoidance

(1) Subject to (2) below, if acting only for the borrower in a standard mortgage of property you must not accept or act upon any requirements by way of undertaking, warranty, guarantee or otherwise of the lender, the lender's lawyer or C other agent which extend beyond the limitations contained in 3.19.

(2) Provided the property is not to be used solely as the borrower's private residence, (1) above does not prevent you from giving any form of certificate of title recognised from D time to time by the Solicitors Regulation Authority Board (a "recognised certificate"). Additions or amendments which arise from the individual transaction may be made to the text of a recognised certificate but, to the extent to which they create an increased or additional obligation, must not extend E beyond the limitations contained in 3.19.

3.23 Waivers

In spite of 22.01(1) (Waivers), the Solicitors Regulation Authority Board shall not have power to waive any of the provisions of F 3.01 to 3.05.

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